No. 504

In the Supreme Court of the United States

OCTOBER TERM, 1951

THE RUBEROID CO., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

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OPINIONS BELOW

The findings and conclusion of the Federal Trade Commission appear at R. 86-90. The opinion of the Court of Appeals (R. 95) is reported at 189 F. 2d 893. The opinion on rehearing (R. 118) is reported at 191 F. 2d 294.

JURISDICTION

The final decree of the Court of Appeals was entered on September 5, 1951 (R. 123). The petition for a writ of certiorari was filed on December 28, 1951, and granted on January 28, 1952 (R. 131). The jurisdiction of this Court rests on Section

11 of the Clayton Act, 38 Stat. 734, 15 U.S.C. 21, and on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Trade Commission's order directing petitioner to cease and desist from discriminating in price among its customers, competitively engaged with one another in the resale or distribution of Ruberoid products, is too sweeping because—

(a) it makes no exception for small price differentials;

(b) it is not restricted as to territory;

(c) it does not except sales to wholesalers and manufacturers.

2. Whether, despite petitioner's failure to make an offer of proof justifying price differentials, the Commission was obliged to include provisos in its order, to the effect that it should not be construed as prohibiting differentials justifiable on a cost or meeting-competition-in-good-faith basis.

STATUTE INVOLVED

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act of June 19, 1936, 49 Stat. 1526, 15 U.S.C. 13, provides in part:

> (a) That it shall be unlawful for any person engaged in commerce, * * * either directly or indirectly, to discriminate in price between

different purchasers of commodities of like grade and quality, * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered * * *.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

STATEMENT

On July 26, 1943, the Federal Trade Commission issued a complaint (R. 1-4) charging petitioner ("Ruberoid") with having violated Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act. The complaint alleged that Ruberoid was engaged, in competition with others, in the business of manufacturing and selling roofing materials and allied products in interstate commerce; that it was discriminating in price between different purchasers of like products; that the purchasers were competitively engaged in the resale of the products which were the subject of the discriminations; and that the effect "has been, or may be, substantially to lessen competition in the line of commerce in which the purchasers receiving and those denied the benefits of such discriminatory prices are engaged and to injure, destroy or prevent competition between purchasers receiving the benefit of said discriminatory prices and those from whom they are withheld" (R. 4).

In its answer (R. 4-7), Ruberoid admitted that it was engaged in business as alleged in the complaint; that many of its customers are competitively engaged with one another (and with customers of Ruberoid's competitors) in the resale of roofing materials and allied products; and that it grants to wholesalers a discount of 5 percent

above the discount granted retailers and "applicators."[1]

Ruberoid denied that it had discriminated, stating that "any differentials in the prices of its products made only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities were sold or delivered to the purchasers thereof, or were made in good faith to meet equally low prices of competitors" (R. 6). It also denied that its practices had the effect of injuring competition.

An initial hearing on the complaint was held before a trial examiner at New Orleans, Louisiana, on March 7, 1946, at which time Commission counsel introduced evidence of Ruberoid's discriminatory pricing practices *vis-à-vis* numerous purchasers in that trading area. Ruberoid presented no evidence to contest the showing of discriminations and no evidence to support its affirmative defenses of cost justification and lowering of prices in good faith to meet competition.[2] A further

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[1] "Applicators" refers to contractors who apply roofing materials to buildings on contract jobs for which they are paid as a whole (R. 5; 96).

[2] Ruberoid's petition to this Court states (p. 2): "Petitioner did not dispute that these local 1941 discriminations had occurred, nor did it attempt to justify them under the statute. The defense of meeting competition was pleaded, but was not pressed * * *."

hearing was held in Washington, D. C. at which neither party sought to introduce additional evidence. Both sides accordingly rested and the record was formally closed on June 7, 1948 (R. 57).

The examiner filed a recommended decision (R. 56-77) which concluded with the proposal that general prohibitions be entered against Ruberoid's engaging in discriminatory sales practices (R. 76-77). Ruberoid filed exceptions (R. 79-84) in which it protested the entry of what it termed "a blanket injunction" (R. 83). It made no offer of proof, however, to justify the granting of differentials of any character. The Commission, after receiving briefs and hearing oral argument, made its findings of fact (R. 86), concluded that Ruberoid's practices were unlawful (R. 90), and issued an order directing it to cease and desist from discriminating in price—

> By selling such products of like grade and quality to any purchaser at prices lower than those granted other purchasers who in fact compete with the favored purchaser in the resale or distribution of such products [R. 90-91].

Ruberoid thereupon filed a petition in the Court of Appeals for the Second Circuit (R. 91-94), praying that the order be set aside or, alternatively, that it be modified in four respects by the addition of provisos and exemptions (R. 92-93). Specifically, it asked that the order be amended—

(1) By adding a proviso to the effect that the order should not be construed as prohibiting differentials which have a cost justification;

(2) By adding a proviso to the effect that the order should not be construed as prohibiting the lowering of prices to any purchaser when such action is taken in good faith to meet competition;

(3) By exempting sales to competing wholesalers and competing manufacturers from the prohibitions of the order, and limiting its effect to sales to retailers and applicators;

(4) By exempting from the prohibitions of the order differentials less in amount than those found to have a probable injurious effect upon competition.[3]

In its opinion, the Court of Appeals (Judges L. Hand, Augustus N. Hand, and Clark) unanimously rejected the requested modifications, affirmed the order in its entirety, and granted enforcement. In its opinion on rehearing, the court reconsidered the question of enforcement and decided (Judge Clark dissenting) that its grant was premature.[4] The opinion on rehearing nowise

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[3] In this connection, Ruberoid contended (R. 93) that there was "no evidence that a price differential of less than 2½% between competing retailers" would adversely affect competition.

[4] In No. 448, the Commission is seeking review of this aspect of the court's decree, and a separate brief has been filed by the Commission in that case.

affects the Court of Appeals' determination that the cease and desist order was valid in all particulars.

In its petition to this Court, Ruberoid makes the various objections to the cease and desist order which it raised by its Petition to Review filed in the court below. In addition, it contends that the prohibitions of that order should not have been made applicable to sales in geographic areas other than the New Orleans trading area.

SUMMARY OF ARGUMENT

I

Ruberoid admits that the basis for issuing a cease and desist order was established, but attacks the breadth of the Commission's order, contending (a) that it should have excepted smaller differentials than those proved to have been granted in the past, (b) that it should have been limited geographically, and (c) that it should have excepted sales to wholesalers and manufacturers.

It is necessary, at the outset, to consider the character of the pleadings and of the proof, and the nature of the Commission's duties under the statute.

The Commission's complaint charged that Ruberoid unlawfully discriminated in its sales to customers competitively engaged with one another. Ruberoid entered a general denial and additionally

pleaded the affirmative defense that it could justify under the statute such price differentials as it had granted. The Commission proved numerous instances of definite price discrimination in support of its charge. This testimony went uncontradicted. Moreover, Ruberoid made no effort to meet its statutory burden of showing legal justification for the granting of differentials. Consequently, the Commission's finding that Ruberoid had engaged in the kind of unlawful conduct charged was based on uncontradicted testimony. The Commission's finding of resulting injury to competition likewise rests on substantial and uncontested proof, which was received in evidence even though there may not have been any statutory necessity for its introduction. See *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 50.

Commission orders are corrective or preventive measures which are wholly prospective in their operation. As this Court has frequently recognized, it is essential to the administration of the Commission's regulatory powers that the Commission be accorded wide discretion in framing its orders. The courts will interfere only if the remedy selected has no reasonable relation to the evils proved to exist. *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608. There is no question that the remedy should be sufficiently comprehensive to afford protection against similar violations in the future. Indeed, "to be of any value the

order must proscribe the *method* of unfair competition." *Hershey Chocolate Corporation* v. *Federal Trade Commission*, 121 F. 2d 968, 971 (C.A. 3). [italics supplied]

In the light of these considerations, Ruberoid's specific objections to the order must be rejected.

A. The instances of discrimination established by the proof involved price differentials amounting to 5 percent or more. This does not mean, however, that the Commission was obliged to except from its order discriminatory differentials falling below that mark. That is particularly true when, as here, there was testimony of competition in the trade which was so keen that even very slight differentials in the prices charged customers were material. Ruberoid's contention, carried to its logical extreme, would result in a practical frustration of the law since it would prevent the Commission from issuing orders adequate to cover any variation in the form or degree of illegal conduct.

B. The contention that the Commission's order should have been restricted to the New Orleans trading area was not made by Ruberoid in the Court of Appeals, and, for that reason alone, would seem to be unavailable to it here. But, in any event, the argument is without force. Petitioner made no offer of proof at the administrative hearings to show justification of *any* differentials. And

it made no claim that the practices shown to prevail in the New Orleans area were in any way atypical. Moreover, it affirmatively appears that the Company's pricing policies and practices are formulated on a national scale. Ruberoid's decision to rest without putting in any affirmative case invited a general proscription of the illegal methods shown to have been pursued in specific instances. In the circumstances, the Commission was certainly not required to conduct repetitive hearings throughout the country. *Cf. United States* v. *United States Gypsum Company,* 340 U.S. 76.

C. Ruberoid also argues that the Commission should have classified its customers along functional lines and excepted sales to wholesalers and manufacturers from the prohibitions of the order. It claims that there was no proof of discrimination in respect of sales to customers in these categories.

The Commission found that a primary means by which Ruberoid practiced discrimination was by arbitrary classification of its customers, *e.g.,* by denominating one roofing contractor a wholesaler and giving him a special wholesaler's discount, while designating another contractor, in competition with the first, a retailer and hence not entitled to similar treatment. Since Ruberoid's classification of customers did not necessarily reflect real differences in function, the Commission carefully avoided ambiguous labels and adopted terminology

which would strike directly at the illegality. It prohibited price discrimination in respect of sales to all customers "who in fact compete * * * in the resale or distribution of [Ruberoid] products." In casting its order in these terms, the Commission forbade the precise conduct condemned by the Act.

So far as sales to manufacturers are concerned, it should also be noted that the order does not in any case apply, since it is in terms restricted to sales to customers engaged in the "resale or distribution" of Ruberoid products.

II

Ruberoid also asserts that the Commission was obliged to include in its order provisos to the effect that it should not be construed as prohibiting differentials justifiable on a cost or meeting-competition-in-good faith basis. It is true that differentials so justified are beyond the condemnation of the statute. But the party claiming justification has the burden of proving the underlying facts upon which the claim is founded. *Federal Trade Commission* v. *Morton Salt Company*, 334 U.S. 37. If he has such proof, he must present it to the Commission. *Ibid.* Were the Commission to include the provisos sought, the order would be "potentially misleading" (Opinion of the Court of Appeals, R. 97). It would suggest that the courts were to determine *de novo*, each time a

violation was charged, the issues that were tried and adjudicated by the Commission.

If petitioner, at any future date, can show a definite change in circumstances which justifies a narrowing of the prohibitions, it can petition the Court of Appeals for appropriate modification. Moreover, if petitioner is at any time charged with contempt, it can plead facts, constituting a defense under the statute, which it has not had a previous opportunity to present. But it will not be entitled to a new hearing on matters already settled by the proceedings. In short, petitioner can still claim the benefits of the provisos in the statute to the extent that it has not already foreclosed itself on particular issues of fact. But it is in no event necessary to include the language of the statutory provisos in the order.

ARGUMENT

I

IN THE LIGHT OF RUBEROID'S FAILURE TO JUSTIFY DIFFERENTIALS OF ANY CHARACTER, THE COMMISSION WAS WARRANTED IN ENTERING A GENERAL PROHIBITION AGAINST A CONTINUED DISCRIMINATION IN SALES TO COMPETING CUSTOMERS

Ruberoid does not deny that the Commission was warranted in entering a cease and desist order against it. It contends, however, that the order is too broad and goes beyond the proof, in that its terms cover (a) discriminatory differentials less

in amount than those found to have been granted in the past; (b) discriminatory differentials to competing customers doing business in areas other than the New Orleans trading area; and (c) discriminatory differentials to competing wholesalers and competing manufacturers.[5] Since the generality of the order is the focus of the attack, it is important, first, to consider the pleadings, the proof and the findings, and, second, the purpose of the statute.

The complaint charged unlawful price discriminations in Ruberoid's sales to purchasers competitively engaged with one another. Ruberoid denied that it had discriminated in fact and affirmatively claimed that its differentials in prices were justifiable under the statute (see Sections 2 (a) and (b), *supra*, pp. 2-3). In support of its charge, the Commission showed numerous instances in which Ruberoid differentiated in the prices which it charged its customers competitively engaged with one another in the New Orleans trading area, the particular differentials ranging in amount from 5 percent to 7½ percent of the purchase price. It also appeared that Ruberoid's pricing practices in all areas were centrally controlled by the company's New York office (R. 25, 42/43). Ruberoid introduced no evidence to contest the Commission's showing that discriminations

[5] Ruberoid seeks to limit the order to sales to applicators and retailers.

had taken place. Moreover, it made no offer of proof at any stage of the proceedings to show that differentials of any character or description could be justified, either in terms of cost factors or meeting competition.

The Commission also found, again upon uncontradicted evidence developed at the New Orleans hearing, that competition among the purchasers of Ruberoid's products was keen (R. 22-24, 26-27, 31, 32, 53-55, 89); that, for example, in the case of applicators, a difference of a dollar or more in the asking price on a roofing job might be a decisive factor in securing the business for a bidder (R. 55); and that Ruberoid itself recognized that small differences in its prices might be highly important in the trade (R. 22-24). The Commission determined that "In these circumstances customers receiving preferential discounts had a material competitive advantage over customers to whom such discounts were denied" (R. 89), and that the effect of the discriminations "may be substantially to lessen competition in the line of commerce in which the purchasers receiving and those denied the benefits of such discriminatory prices are engaged, and to injure, destroy, or prevent competition between the purchasers receiving the benefit of such discriminatory prices and those from whom such prices are withheld" (R. 89).[8]

[8] In addition, there is, of course, a strong legal presumption that an appreciable difference in the prices charged compet-

If Commission proceedings were for the purpose of awarding compensation to injured parties or imposing punishment for past illegal acts, most certainly the Commission would be required to limit the damages or the punitive sanctions to the particular instances of violation shown by the evidence to have taken place. But Commission proceedings are neither compensatory nor punitive in character; they are strictly corrective and preventive measures "taken in the interest of the general public". *Federal Trade Commission* v. *Gratz*, 253 U.S. 421, 432 (dissenting opinion of Justice Brandeis); *Gimbel Bros.* v. *Federal Trade Commission*, 116 F. 2d 578, 579 (C.A. 2). Commission orders are "not retrospective, but wholly prospective in operation" (*Standard Container Manufacturers' Assn.* v. *Federal Trade Commission*, 119 F. 2d 262, 265 (C.A. 5)), being intended "not to punish for past acts, but to prevent the occurrence" of illegal conduct. *California Lumbermen's Council* v. *Fed-*

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ing customers is injurious to competition. As stated by this Court in *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 50, "It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a 'reasonable possibility' that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers." See, also, *Samuel H. Moss, Inc.* v. *Federal Trade Commission*, 148 F. 2d 378, 379 (C.A. 2), certiorari denied, 326 U.S. 734.

eral Trade Commission, 115 F. 2d 178, 184 (C.A. 9), certiorari denied, 312 U.S. 709. It is not without significance that the Robinson-Patman Act outlaws discrimination which *may be* harmful to competition, and is not limited to practices which have been conclusively demonstrated to work measurable injury. See *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. at 50.

This Court has indicated time and again that in the areas of trade and commerce, "the Commission has wide direction in its choice of a remedy deemed adequate to cope with the unlawful practices . . .", *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 611. And "the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Id.*, p. 613. *Cf. International Salt Co.* v. *United States*, 332 U.S. 392, 400. As we shall show in dealing with Ruberoid's specific objections, the remedy here selected by the Commission bears the required relationship to the evils found.

A. THE PROHIBITION OF DISCRIMINATORY DIFFERENTIALS OF LESS THAN 5 PERCENT

The specific instances of discrimination found by the Commission involved differentials of 5 percent or more. Ruberoid raises the question whether, in this circumstance, the Commission

may enter a blanket prohibition against all discriminatory differentials, however small.[7]

The Commission's complaint alleged an unfair and unlawful course of conduct—charging different customers different prices for like items without justification. The undisputed evidence establishes that Ruberoid pursued this course of conduct.[8] And Ruberoid made no offer of proof to show that differentials in any amount were justified, although justification, if any existed, would constitute a matter peculiarly within its own knowledge and one which it is required to establish affirmatively. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. at 44-45; *Samuel H.*

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[7] Ruberoid speaks at various points in its brief as if the Commission had prohibited all differentials in sales to competing customers. We would emphasize, however, that the order prohibits *discrimination* by means of differentials, but does not purport to hold differentials *per se* discriminatory. In the event that the Commission should charge a violation of its order, there is no question, as the Court of Appeals has pointed out, that Ruberoid could affirmatively plead that no discrimination was involved because the particular differentials in question were justified, *i.e.*, fell within the statutory exceptions. The only limitation is that Ruberoid would not be entitled to retry issues that were, or could have been, litigated in the original proceeding. See discussion, *infra*, Point II.

[8] The differentials were not based on quantity but purportedly rested on a classification of customers as wholesalers or retailers (R. 12, 14, 20, 56). The application of the classifications, however, was shown to be completely arbitrary (R. 87-89). Moreover, some customers were admittedly granted unpublished or secret discounts denied to others (R. 9, 15).

Moss Inc. v. *Federal Trade Commission*, 148 F. 2d at 379. Ruberoid would have it, however, that, because the specific instances which illustrate its illegal course of conduct involved unjustified differentials amounting to 5 percent or more, the Commission is precluded from proscribing discriminations in lesser amounts.

This contention, carried to its logical extreme, would enable a recalcitrant company to make a complete mockery of the Act. Take the case of a company all of whose discriminations involved price differentials of exactly 5 percent. If this circumstance should be deemed to render it impossible for the Commission to prohibit discriminations in amounts less than 5 percent, there would be nothing to prevent such a company from discriminating with impunity in the amount of 4⅞ percent, the very day after the Commission had entered a cease and desist order against it. Of course, the Commission could then undertake a new administrative proceeding to pave the way for an order prohibiting discriminations in the amount of 4⅞ percent or more. Whereupon, the company might then with impunity whittle its differentials to 4¾ percent. By shaving the amount of the reduction very slightly on each occasion, the process might be continued *ad infinitum*.

The law requires no such exercise in futility. As has been held repeatedly, the Commission may

make its remedies effective. In *Hershey Chocolate Corp.* v. *Federal Trade Commission,* 121 F. 2d 968, 971-972, the Court of Appeals for the Third Circuit, rejecting the contention that a Commission order was invalid because it prohibited "unfair practices in connection with several confectionery items whereas the complaint was limited to one", stated:

> * * * the Commission's power would be limited indeed if it were [so] restricted * * *. To be of any value the order must proscribe the method of unfair competition * * *. In no other way could the Commission fulfill its remedial function.

See, also, *Jacob Siegel Co.* v. *Federal Trade Commission,* 327 U.S. 608, 612-613; *Charles of the Ritz Distributors Corp.* v. *Federal Trade Commission,* 143 F. 2d 676, 680 (C.A. 2); *Haskelite Manufacturing Corp.* v. *Federal Trade Commission,* 127 F. 2d 765, 766 (C.A. 7). As this Court declared in *National Labor Relations Board* v. *Express Publishing Co.,* 312 U.S. 426, 436, it is "a salutary principle that when one has been found to have committed acth in violation of a law he may be restrained from committing other related unlawful acts." Similarly, it has been held time and again in cases arising under the Sherman Act that the courts, in fashioning their decrees, are bound to take reasonable measures to preclude revival of unlawful practices (see *Ethyl Gasoline*

Corporation v. *United States*, 309 U.S. 436, 461), and that "When the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed." *International Salt Co.* v. *United States*, 332 U.S. 392, 400. Plainly, the Commission's order need not be frozen fast in a mold precisely corresponding to the particular outlines and features of the specific violations found to have taken place in the past, and wholly incapable of embracing future variations in the form of the unlawful conduct.

Ruberoid argues that, at the least, the Commission's order should except from prohibition, to borrow Judge Clark's phrase, a "modest maximum." It says that, in any event, it should have been permitted to grant to retailers differentials of 2½ percent or less.[9] It apparently recedes to this figure because its Southern sales manager admitted on examination that differentials of small amounts, and specifically of 2½ percent, were highly important in the realm of competition. The sales manager, it should be noted, did not testify that differentials lower than 2½ percent would be unimportant, but testified that com-

[9] It does not make this contention in connection with sales to applicators. As noted, *infra*, it desires to have sales to wholesalers and manufacturers completely exempted from the order.

petition in the trade was generally "keen" (R. 23). Other witnesses affirmatively testified that even very slight discriminations were material in their effect upon the conduct of the roofing business (R. 27, 31, 32, 55). The Commission so found (R. 89). Accordingly, as the court below held (R. 98), there are two definite answers to the request for a modification permitting a 2½ per-cent differential:

> First, there is nothing in the law suggesting such a limited differential; even assuming *arguendo* that the Commission perhaps might permit it on a finding of immateriality under all the circumstances, we cannot force such a finding upon it. Second, there was evidence tending to show that differentials of small amounts were important in the trade.

Ruberoid seeks comfort in this Court's opinion in the *Morton Salt* case. But, as the Court of Appeals pointed out, "that decision is quite definitely against the contention made" (R. 98). We quote from Judge Clark's cogent analysis (R. 98-99):

> In that case the Commission expressly prohibited selling "to some wholesalers [or retailers as covered by a separate paragraph] thereof at prices different from the prices charged other wholesalers who in fact compete in the sale and distribution of such products; provided, however, that this shall not prevent price differences of less than five cents per case which do not tend to lessen,

injure, or destroy competition among such wholesalers [retailers.]" The Court specifically says, 334 U.S. at page 53: "Paragraphs (a) and (b) up to the language of the provisos are approved," a statement it repeats later, 334 U.S. at page 55. It goes on to point out that the clause permitting differentials of less than five cents "would appear to benefit respondent, and no challenge to it, standing alone, is here raised." Then it considers the respondent's objection to the final clause and holds that clause invalid for a vagueness which throws the whole question into the courts. It strikes this latter part out, but, while saying that it would sustain the order with the exception of the proviso, nevertheless concludes that the deleted part is so important that the Commission "should have an opportunity to reconsider the entire provisos in light of our rejection of the qualifying clauses, and to refashion these provisos as may be deemed necessary."

Thus it is quite clear that an order may legally prohibit *all* differentials, and hence the form of prohibition before us is justified by the *Morton Salt* case itself. It is to be noted that the Court does not in that case expressly approve of the small differential of five cents per case there suggested by the Commission, although it is a possible inference, in view of the purpose for which the matter was returned to the Commission, that a finding in favor of such a differential would not be illegal if based on appropriate evidence. It

> is clear, however, that the case does not force the Commission always to indicate some modest maximum in stating its prohibition.

Ruberoid points to the following statement in *Morton Salt* (334 U.S. at 53-54):

> Whether, and under what circumstances, if any, the Commission might prohibit differentials which do not of themselves tend to injure competition, we need not decide, for the Commission has not . . . taken action which forbids such noninjurious differentials.

But this question is not presented by the instant case either. The Commission has not proscribed "noninjurious differentials." As in *Morton Salt*, its order rests upon findings that the prohibited discriminatory differentials may be injurious to competition (R. 89)—findings supported by evidence which Ruberoid did not see fit to challenge, and further sustained by a "self-evident" presumption (see 334 U.S. at 50).

B. THE PROHIBITION OF DISCRIMINATORY DIFFERENTIALS AS APPLIED TO OTHER TRADING AREAS

Ruberoid points out that the Commission's proof showed only that unlawful practices were followed in the New Orleans trading area. Although its brief does not press the point, it appears to question the power of the Commission to proscribe such practices in terms broad enough to cover sales in other geographic areas where Ruberoid,

a national company (R. 2, 5), does business. (Pet. 5)

We note at the outset that this contention was not made in the court below (see R. 92-93) and that petitioner would accordingly seem to be precluded from raising it at this late stage of the proceedings. *Duignan* v. *United States*, 274 U.S. 195, 200. There appear to be no exceptional circumstances warranting departure from the rule that this Court will restrict itself to questions that have been urged in the court of appeals. *Ibid.*

In any event, however, we think that this contention is without merit. The Commission charged (without limitation as to territory) that Ruberoid was engaged in practices violative of the Clayton Act. It proved specific instances of violation. Ruberoid offered no conflicting evidence.[10] And it made no claim or offer of proof calculated to show that its conduct in the New Orleans trading area was atypical.[11] Moreover,

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[10] Even after it took exception to the Examiner's proposal that a general prohibition be entered, Ruberoid sought no leave to put in evidence to justify particular differentials.

[11] Citing R. 19-21, Ruberoid argues (Brief, pp. 3-4) that it appeared from the evidence adduced by the Commission that the New Orleans discounts resulted from local conditions and were not indicative of the company's practices elsewhere. The record does not support this statement. At R. 21, Ruberoid's southern sales manager testified as follows:

"Q. In other words, your asbestos shingle distributors, in other

as previously noted, it appears from the testimony of Ruberoid's sales manager that the Company's pricing policies and practices were national in scope and were centrally controlled (R. 25, 42-43). In these circumstances, the Commission was not required, we submit, to conduct repetitive hearings in various areas throughout the country. It was plainly entitled, without more, to "proscribe the method of unfair competition," wherever practiced. *Cf. Hershey Chocolate Corp.* v. *Federal Trade Commission, supra,* and cases previously cited, pp. 16-17, 20-21, *supra.* What was said in *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 90, applies with at least equal vigor here:

> The complaint of Sherman Act violation was restricted to the eastern territory of the United States. The evidence applied only to that area. However, the close similarity between interstate commerce violations of the

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places, don't get the same discount that the New Orleans distributor gets?

"A. Yes, they do. Our asbestos shingle distributors in other places receive the same discounts, but I have pointed out—I wish to point out, in other localities, we may sell two accounts; say, if we are dealing with two accounts—usually we deal with one. If we deal with two accounts, one account may be a recognized wholesaler, and the other account will be specifically a retail merchant, and we provide a difference there——

"Q. Now, that's——

"A. To the extent of 5 percent."

See, also, his testimony at R. 25-26.

Sherman Act in eastern territory and western territory seems sufficient to justify the enlargement of the geographical scope of the decree to include all interstate commerce.

C. THE FAILURE TO INCLUDE A SPECIFIC EXEMPTION FOR SALES TO WHOLESALERS AND MANUFACTURERS

1. *Sales to wholesalers*

As Ruberoid points out, in many instances Commission cease and desist orders issued under Section 2 of the Clayton Act have undertaken to classify customers by functional designations. Thus, in *Morton Salt*, one paragraph of the order forbade discriminatory sales to *wholesalers* competitively engaged with one another in the distribution of Morton's table salts, while a second paragraph was made applicable to sales of the same products to *retailers* (334 U.S. at 51, fn.). It does not follow, however, that the Commission is required to adhere to a particular classification formula and that no other method of denoting the incidence of the order will do. The statute declares it "unlawful for any person * * * to discriminate in price between different purchasers of commodities of like grade and quality * * * where the effect of such discrimination may be substantially to lessen competition * * * in any line of commerce * * *" Obviously, then, the Commission could frame its order to prohibit Ruberoid from discriminating in price—

> By selling [its] products of like grade and quality to any purchaser at prices lower than those granted other purchasers who in fact compete with the favored purchaser in the resale or distribution of such products. [R. 90-91]

The order is eminently plain in its meaning and application. It strikes directly at the precise evil condemned by the Act.

In the instant case, the Commission had excellent reason to eschew the descriptive terms "wholesaler," "retailer," "applicator," and to adopt the designation "purchasers who in fact compete." As used by Ruberoid, the former terms were ambiguous. Arbitrary classification of customers was one of the primary devices by which discrimination was perpetrated. Thus, the record establishes that Ruberoid treated the following applicators as wholesalers and granted them its so-called wholesaler discount of 6 percent plus 5 percent—

> National Roofing (Comm. Exs. 2, 8, 23, 35, 37, 43, 45, 47, 49a and b);
>
> F. J. Villars (Comm. Exs. 4, 19, 21, 41);
>
> Brandin Slate (Comm. Exs. 6, 12, 14, 16, 19, 25, 32, 34, 51, 55); and
>
> Hibernia (Comm. Exs. 10, 29, 31),

At the same time, it denied such classification and discount to the following purchasers who were

competitively engaged with the above purchasers as applicators—

A. H. White (Comm. Exs. 1, 3, 11, 17, 26, 42, 44, 46, 48, 50);

David Usner (Comm. Exs. 5, 9, 13, 22, 33, 52);

Jordy Bros. (Comm. Exs. 7, 15, 18, 24);

Modenbach (Comm. Exs. 20 and 38);

Chassaniol (Comm. Exs. 30 and 36); and

Dietrich (Comm. Ex. 56).[12]

In short, Ruberoid did not actually sell to purchasers on the basis of functional differences. Its functional classifications were a facade for discrimination. The Commission took full account of this in its Findings, stating (R. 89):

> There is sharp disagreement between counsel as to whether the record establishes discriminations by respondent among wholesalers. In the opinion of the Commission, the trial examiner is correct in his conclusion that there is insufficient evidence to establish such discriminations. However, as the trial exam-

[12] Some of the invoices disclose the fact that, in addition to the so-called wholesaler discount of 6 percent and 5 percent granted its favored purchasers, petitioner granted these purchasers, in various instances, an additional discount designated "competitive discount on 'A' products" or "competitive discount" which petitioner did not grant to other purchasers competing with the favored purchasers *in the same area under exactly the same competitive conditions* (see Comm. Exs. 2, 4, 6, 12, 19, 21, 23, 25, 27, 32, 34, 37, 39, 40, 41, 47, 49b, 53, 54, 55, 57).

iner points out, there is some confusion on this point due to the fact that the particular designations given purchasers are not always controlling as indicating the functions actually performed by such purchasers. For example, one purchaser, although engaged primarily as a roofing contractor or applicator, sold quantities of the products to other applicators. And another purchaser, although classified by respondent as a wholesaler, also functioned as an applicator.

The Commission is of the view that the particular designations applied to the various purchasers is of little importance. The fundamental and controlling factor in the proceeding is that the record establishes price discriminanations by respondent among purchasers who are in fact competing with one another in the resale of the products in question, and the particular terms used to describe the various purchasers are immaterial. The corrective action taken by the Commission in the matter should be sufficiently comprehensive to stop the discriminations, irrespective of the designations applied to the purchasers.

The Court of Appeals quite correctly held that the Commission was justified "in concluding that there was no real functional difference necessarily disclosed by petitioner's classification of its customers and that the order should hit the evil directly, rather than invite evasion by incorporating an ambiguous label" (R. 98).

Ruberoid states that the Commission did not find discrimination in sales to "wholesalers" and proceeds to argue that accordingly such sales should have been exempted. What it obscures or ignores is the finding of the Commission that Ruberoid's use of the term "wholesaler", as reflected by its application of that classification to various customers, was an ambiguous label.[18]

Ruberoid is not precluded by the Commission's order from selling to customers doing business at different competitive levels at different prices. It may differentiate, for example, between one whose operations are confined to wholesaling and another who is exclusively a retailer. But, under the Commission's order, it may no longer discriminate between two customers competing with one another by the simple expedient of calling one a wholesaler and the other a retailer. "* * * [W]here a supplier sells at different prices to different purchasers who may be or become competitors, he must keep himself informed as to the true nature and scope of the business activities of his customers, if he would avoid violation of the Robinson-Patman Act." Cyrus Austin, *Price Discrimination and Related Problems Under the Robinson-*

[18] Note, also, in this connection, the Court of Appeals' observation (R. 98) that "an 'applicator' who purchases petitioner's products to use them in a contracting job for some building owner would seem pretty much like a wholesaler; moreover, as the Commission pointed out, there was no rigid differentiation of function."

Patman Act, American Law Institute (1950) p. 52. That is precisely what Ruberoid has failed to do in the past and what the Commission's order requires it to do in the future.

2. Sales to manufacturers

Ruberoid also complains that the order fails to except sales to manufacturers. For the reasons already stated, we believe that the Commission was not required to cast its order in terms of sales to persons falling within specified functional classifications, and that the prohibitions might "hit the evil directly."

We would add, however, that, so far as sales to manufacturers are concerned, petitioner is setting up a straw man. The Commission's order forbade discrimination in connection with the sale of Ruberoid products to persons competitively engaged with one another "in the resale or distribution of such products" (R. 91). By definition, other manufacturers are not engaged in the resale and distribution of Ruberoid products. If they were, they would not be performing the function of manufacturers, but that of wholesalers, distributors, or retailers, in which event there would be no reason whatever to place them beyond the reach of the order.

The illustration which Ruberoid has used in connection with its contention concerning sales to manufacturers exposes the fallacy in its argument.

It has urged that "petitioner might be held in violation of [the] order if it sold shingles or siding at slightly different prices to two competing manufacturers of prefabricated houses" (Brief, p. 19). Palpably, that is not so. Manufacturers of prefabricated houses are not engaged in the "resale or distribution" of shingles and siding any more than manufacturers of men's clothing are engaged in the resale or distribution of buttons and thread.[14] Petitioner's sales manager referred to American Can Company, General Motors, or "any of the steel mills" as buyers which would fall in the category of manufacturing concerns (R. 9). It cannot be seriously suggested that sales to such buyers fall within the proscriptions of the order. If, however, a manufacturing concern should be incidentally engaged in the business of acting as a sales outlet for Ruberoid products, and competitively engaged, in that aspect of its business, with other distributors of Ruberoid products, it would not be beyond reach of the order. Clearly, on those facts it should not be.

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[14] It is equally obvious that "applicators", *i.e.*, persons who are engaged in the business of reselling roofing products to consumers on a contract basis (R. 2, 5) *are* engaged in "resale or distribution" of those products.

II

THE COMMISSION WAS NOT REQUIRED TO INCORPORATE IN ITS ORDER THE PROVISOS SET FORTH IN SECTION 2 OF THE CLAYTON ACT

After describing the kind of price discriminations which "shall be unlawful," Section 2 (a) of the Clayton Act declares:

> *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered * * *.

Section 2 (b) provides in substance that if the Commission charges discrimination and makes out a *prima facie* case, the affirmative burden of showing justification shall be upon the person charged with violation. In the absence of such showing, the Commission is authorized to enter an order terminating the illegal practice. The Section then adds:

> *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

Ruberoid contends that, even though it failed to make any showing of justification at the hearing on the complaint, the Commission was obliged to include provisos in its order, to the effect that it should not be construed as prohibiting differentials which can be justified on a cost or meeting-competition-in-good-faith basis.

The burden of proving that a seller comes within one of the Act's exceptions is placed squarely upon the one who claims it. Section 2 (b); *Federal Trade Commission* v. *Morton Salt Co., supra; Standard Oil Co.* v. *Federal Trade Commission,* 340 U.S. 231, 250; *Corn Products Refining Co.* v. *Federal Trade Commission,* 324 U.S. 726, 741. Ruberoid pleaded justification of differentials but failed to introduce any proof or to make any offer of proof in support of its affirmative defenses. This it admits (Brief pp. 4, 11-12). Certainly, in such circumstances, the Commission was not required to include in its cease and desist order language preserving to Ruberoid the defenses which it raised but did not sustain before the Commission.

The decision in the *Morton Salt* case indicates that the inclusion of the provisos sought by the petitioner would be inappropriate. This Court stated (334 U.S. at 54):

> The effective administration of the Act, insofar as the Act entrusts administration to the Commission, would be greatly impaired if, without compelling reasons not here

> present, the Commission's cease and desist orders did no more than shift to the courts in subsequent contempt proceedings for their violation the very fact questions of injury to competition, etc., which the Act requires the Commission to determine as the basis for its order. The enforcement responsibility of the courts, once a Commission order has become final either by lapse of time or by court approval, 15 U.S.C. §§ 21, 45, is to adjudicate questions concerning the order's violation, not questions of fact which support that valid order.

Whether a seller's apparently discriminatory practices can be justified by cost factors or by the low prices of a competitor are questions of fact to be ascertained by the Commission. Those issues were posed by the Commission's complaint and Ruberoid's answer. If the Commission's order were cast in terms suggesting that those issues remained open, the order would appear to be shifting to the courts the task of trying *de novo* the issues adjudicated by the Commission pursuant to statutory direction. As stated by the Court of Appeals, inclusion of the provisos sought would be "potentially misleading as suggesting the possible retrial in contempt proceedings of issues already settled" (R. 97).

Ruberoid raises the following hypothetical issue (Brief, p. 14):

> Let us assume that petitioner is now selling its roofing materials to applicators and re-

> tailers in New Orleans at identical prices, in compliance with the order; and that tomorrow a competing manufacturer offers one of these customers a lower price for a comparable product. Under this order petitioner would be prohibited from meeting the competitor's price, except by lowering its price to all of its customers in that area, which this Court has held the statute does not require. * * *

Ruberoid, however, overlooks the fact that the Court of Appeals retains full power to modify its decree and that it will become incumbent upon it to exercise that authority in the event petitioner shows a definite change in circumstances warranting the grafting of an exception upon the prohibitions of the order. See *American Chain & Cable Co.* v. *Federal Trade Commission*, 142 F.2d 909, 912-13 (C.A. 4); *Century Metalcraft Corp.* v. *Federal Trade Commission*, 112 F.2d 443, 447 (C.A. 7); *cf. United States* v. *Morton Salt Co.*, 338 U.S. 632; *United States* v. *Swift & Co.*, 286 U.S. 106. The naked possibility that Ruberoid, at some future date, may be able to show that new conditions justify its granting certain price differentials to particular customers does not compel the inclusion of a catch-all proviso in advance of the event. As indicated in *Morton Salt*, the prohibitions of the Commission's final order should not be subject to exceptions so amorphous and imprecise that the courts will be required to direct a new hearing to

determine the order's coverage each time a question of violation arises. There are surely other and better means of accommodating the order to changed circumstances that may conceivably arise.

The situation is not unlike that considered by this Court in *International Salt Co.* v. *United States*, 332 U.S. 392. The issue there was whether this Court should modify an antitrust decree entered by a district court. Holding that the judgment should not be refashioned "to meet a hypothetical situation," the Court observed that it could be modified "if and when the need arises" (p. 401). The Court added (pp. 401-402):

> The factual basis of the claim for modification should appear in evidentiary form before the District Court rather than in the argumentative form in which it is before us. Nor are we impressed that this will require a multitude of separate applications. Once the concrete problem is before the District Court it will no doubt be able to fashion a provision that will avoid repetitious applications which would be as vexatious to the Court as to the litigants. We leave the appellant to proper application to the court below * * *.

We respectfully submit that the same course should be followed here.

The court below has also pointed out that Ruberoid will not be in contempt of the existing order if it can show, in answer to an alleged violation, that

there are facts constituting a statutory defense *which it has not had a previous opportunity to present*. It stressed, however, (R. 97) that "Only in the event of a definite change of circumstances will a new hearing on the facts be justified." [15]

We believe that the Court of Appeals was correct in its conclusion (R. 97) that "it is surely not necessary to repeat the wording of the statute in the order itself." Insertion of the provisos is "not only unnecessary to the extent that they are legally applicable, but potentially misleading as suggesting the possible retrial in contempt proceedings of issues already settled" (*ibid.*).

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[15] This Court's opinion in *Morton Salt* also recognized that in some cases "compelling reasons" might require a new hearing on questions of fact (334 U.S. at 54). It may be noted that the court of appeals can refer such questions, when they arise in an enforcement proceeding, to the Commission as a special master. This procedure has been adopted frequently. See, *e.g.*, *Federal Trade Commission* v. *Balme*, 23 F. 2d 615, 621 (C.A. 2), certiorari denied, 277 U.S. 598; *Federal Trade Commission* v. *Standard Brands Inc.*, 189 F. 2d 510, 512 (C.A. 2); *Federal Trade Commission* v. *Herzog*, 150 F. 2d 450, 452 (C.A. 2); *Federal Trade Commission* v. *Baltimore Paint & Color Works*, 41 F. 2d 474, 476 (C.A. 4).

CONCLUSION

The final decree of the Court of Appeals, insofar as it sustains the validity of the Commission's order, should be affirmed.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General,

H. G. MORISON,
Assistant Attorney General,

RALPH S. SPRITZER,
DANIEL M. FRIEDMAN,
Special Assistants to the Attorney General.

W. T. KELLEY,
General Counsel,

JAMES W. CASSEDY,
Assistant General Counsel,
Federal Trade Commission.

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